IN THE DISTRICT OF THE UNITED STATES OF AMERICA
FOR THE SOUTHERN DISTRICT OF ILLINOIS

MARION DIAGNOSTIC CENTER, LLC; MARION HEALTHCARE, LLC; and ANDRON MEDICAL ASSOCIATES, individually and on behalf of all others similarly situated, Plaintiff(s),	
vs.	Case **18-CV-1059-NJR**
BECTON, DICKINSON, AND COMPANY; PREMIER, INC.; VIZIENT, INC.; CARDINAL HEALTH, INC.; OWENS & MINOR INC.; HENRY SCHEIN, INC.; and UNNAMED BECTON DISTRIBUTOR CO-CONSPIRATORS, Defendant(s).	

MOTION(S) HEARING

BE IT REMEMBERED AND CERTIFIED that heretofore on **10/17/2018**, the same being one of the regular judicial days in and for the United States District Court for the Southern District of Illinois, **Honorable Nancy J. Rosenstengel**, United States District Judge, presiding, the following proceedings were recorded by mechanical stenography; transcript produced by computer.

REPORTED BY: **Molly N. Clayton, RPR, FCRR**, Official Reporter for United States District Court, SDIL, 750 Missouri Ave., East St. Louis, Illinois 62201, (618)482-9226, *molly_clayton@ilsd.uscourts.gov*

APPEARANCES:

FOR PLAINTIFF:
Steven F. Molo of MoloLamken LLP- Chicago, 300 N LaSalle Street, Suite 5350, Chicago, IL 60654; **and**,

Allison Mileo and Justin Ellis of Gorsuch of MoloLamken LLP, 430 Park Avenue, New York, NY 10022 and
R. Stephen Berry of Berry Law PLLC, 1100 Connecticut Avenue NW, Suite 645, Washington, DC 20036.

FOR DEFENDANT BECTON: **Richard P. Cassetta** of Bryan Cave Leighton, et al. - St. Louis, One Metropolitan Square, 211 North Broadway, Suite 3600, St. Louis, MO 63102; **and**,
Robert A. Atkins and William B. Michael of Paul, Weiss, Rifkind, et al, 1285 Avenue of the Americas, New York, NY 10019.

FOR DEFENDANT PREMIER: **Terrence J. Dee** of McDermott, Will et al. - Chicago, 444 West Lake Street, Suite 4000, Chicago, IL 60606-0029.

FOR DEFENDANT VIZIENT: **Bruce A. Blefeld** of Reed Smith, LLP - Houston, 811 Main Street, Suite 1700, Houston, TX 77002.

FOR DEFENDANT McKESSON: **Daniel Thomas Fenske** of Jenner & Block-Chicago 2, 353 North Clark Street, Chicago, IL 60654.

FOR DEFENDANT SCHEIN: **Barack S. Echols** of Kirkland & Ellis LLP - Chicago, 300 N. LaSalle Street, Chicago, IL 60654.

FOR DEFENDANT CARDINAL: **Scott D. Quellhorst** of Jones Day - Chicago, 77 West Wacker Drive, Suite 3500, Chicago, IL 60601.

FOR DEFENDANT OWENS: **Shari Lahlou and Luke Van Houwelingen** of Crowell & Moring LLP, 1001 Pennsylvania Avenue, N.W, Washington, DC 20004; **and**,
Jordan L. Ludwig of Crowell & Moring LLP, 515 S. Flower Street, 40th Floor, Los Angeles, CA 90071.

INDEX OF WITNESS EXAMINATION

	DX	CX	R-DX	R-CX
No witness testimony.				

INDEX OF EXHIBITS

EXHIBIT	DESCRIPTION	Id'D	Rcv'd
No exhibits identified or received.			

MISCELLANEOUS INDEX

	PAGE
No miscellaneous index entries.	

COURTROOM DEPUTY: The matter of *Marion Healthcare, LLC, et al. versus Becton, Dickinson and Company, et al.*, Case No. 18-CV-1059, is called for a motion hearing.

Would the parties please identify themselves for the record?

MR. MOLO: Good morning, your Honor, Steve Molo, Justin Ellis, and Allison Gorsuch on behalf of the plaintiffs.

THE COURT: All right. Good morning, counsel.

MR. BERRY: Steve Berry, Berry Law PLLC on behalf of the plaintiffs.

THE COURT: All right. Good morning.

MR. CASSETTA: Good morning, your Honor, Rick Cassetta, Bryan Cave, on behalf of the Becton, Dickinson. And I've got with me my co-counsel, Mr. Bob Atkins and Mr. Bill Michael from Paul, Weiss.

THE COURT: Okay. Good morning.

MR. ATKINS: Good morning, your Honor.

MR. MICHAEL: Good morning.

MR. DEE: Good morning, your Honor, Terry Dee on behalf of Premier.

THE COURT: Okay. Good morning.

MR. BLEFELD: Good morning, your Honor, Bruce Blefeld from Reed Smith from Houston for Vizient.

THE COURT: Okay. Good morning.

MR. FENSKE: Good morning, your Honor, Dan Fenske for

McKesson.

THE COURT: All right. Good morning.

MR. ECHOLS: Good morning, your Honor, Barack Echols from Kirkland & Ellis on behalf of the Henry Schein, Inc.

THE COURT: Okay.

MR. QUELLHORST: Good morning, your Honor, Scott Quellhorst on behalf of Cardinal Health.

THE COURT: All right. Good morning.

MS. LAHLOU: And good morning, your Honor, Shari Lahlou and Luke Houwelingen from Crowell & Moring on behalf of Owens & Minor Distribution, along with Jordan Ludwig.

MR. HOUWELINGEN: Good morning, your Honor.

THE COURT: All right. Good morning.

Well, you guys get the more comfortable seats. You back there are welcome to move into the jury box if you want because those are not very comfortable.

So this is set, I think, at the request of the defendants on the pending motions to dismiss. Of course, the district judges are generalists and have to know a little bit about everything, and certainly we get to learn about things that were never the reason we went to law school, which in my book would be antitrust. But I have reviewed everything -- the pleadings here, and I have a general understanding of what the arguments are and what the facts are underlying the complaint and the motion to dismiss. But I think probably at this

point -- and I understand there was a presentation or something. So whoever wants to proceed with just general arguments on the motions to dismiss, and hopefully you all have worked that out. And then I have a few questions I want to ask. I may jump in or wait until the end or whatever.

So who wants to proceed on behalf of the defendants?

MR. CASSETTA: Mr. Atkins will argue it first, your Honor.

THE COURT: Okay. Mr. Atkins, you may proceed.

MR. ATKINS: Good morning, your Honor. May it please the Court.

Robert Atkins. I represent the defendant Becton, Dickinson. With your Honor's permission, I will address Becton's motion to dismiss for lack of standing under the direct purchaser rule. I will then pass the baton to Mr. Dee, who will argue on behalf of the GPOs, and then Mr. Fenske will argue on behalf of the distributors. So we will proceed in that order if that's acceptable to the Court.

THE COURT: Okay. Let me ask, Mr. Molo, will you be arguing for plaintiffs?

MR. MOLO: I will.

THE COURT: So would you like to respond to each different one or do it all at once?

MR. MOLO: I'd like to do whatever you would find most helpful. So if you want us to respond, you know, with each,

that's fine, or if you would like to let the entire argument go forth, then that's fine.

THE COURT: Let's do it in response to each, that might be helpful.

MR. MOLO: And I may take, if it's okay, a little bit of liberty going beyond that to address some of the broader issues.

THE COURT: Okay. All right. That's fine.

Okay. Mr. Atkins.

MR. ATKINS: All right, your Honor.

I do have some show-and-tell and I did it the old-fashioned way. They are just handouts. So if could approach the bench, I will give you a copy.

THE COURT: Great. Okay. Yep. Of course.

Thank you.

MR. ATKINS: And one for the court.

THE COURT: Deana, do you want to give that to Blaire maybe?

MR. ATKINS: So, your Honor, if you would indulge me by turning to Page 2 of the presentation, I will kickoff there. As you know, what brings us here today is the Supreme Court's decision in *Illinois Brick*, as well as its companion cases *Hanover Shoe* and *UtiliCorp*.

I thought I would tee up the issue by sharing with you actually an excerpt from a brief that Mr. Molo's firm submitted

to the Supreme Court this month, in which they well articulated what brings us here today.

For over 40 years, this Court's decision in *Illinois Brick* has prohibited indirect purchasers, i.e., those who do not transact directly with an alleged antitrust violator -- that would be my client BD -- from bringing treble damages suit under the Clayton Act. This bar to claims by downstream end users like the plaintiffs in this case seeking to collect an inflated or overcharged price from a supplier has been so firmly established that the Supreme Court has decided three cases. It's probably the most thoroughly litigated and decisively adjudicated issue in antitrust law. The Supreme Court has visited it three times and come out the same way, stronger in each case.

Likewise, every court in every case that has challenged the use of contracts as we have in this case, contracts with group purchasing organizations, every case that has challenged one of those contracts for resulting in overcharges to hospitals or health care providers likewise has held that the downstream indirect purchasers do not have standing and cannot sue for damages.

And, of course, as I'm sure your Honor did not miss in our briefs, the courts have twice already rejected for lack of standing these same claims against BD; namely, health care providers claiming to have been charged inflated or

anticompetitive prices, overcharges for BD's syringes and catheters that they bought not from BD but from their distributors. And these decisions -- that is to say, the BD decisions, the other cases involving GPO contracts, and, of course, the Supreme Court decisions were not close calls. They were not equivocal. They were clear and emphatic.

The Third Circuit in the *BD* case which involved hospitals and downstream purchasers suing BD for alleged overcharging under GPO contracts held that the Supreme Court established a bright-line rule that only a purchaser immediately downstream -- that is, the distributor -- may bring an antitrust action.

The Ninth Circuit, in *Delaware Valley v. J&J*, another GPO case, this is how they put it. The Supreme Court closed the door on the theory that the end user, like plaintiffs here, who buy from a distributor should have standing.

And the Seventh Circuit in the brand name prescription drug antitrust litigation said that granting standing to downstream indirect purchasers -- in that case, pharmacies -- seeking to cover an overcharge is, and I quote, "just what the Supreme Court in *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp* told the federal courts not to do.

I submit your Honor this is now the third bite at the same apple. It's the same antitrust allegations in the other BD cases -- that is, exclusionary contracts -- with GPOs. It

is the same contracts. It is the same products, in syringes and catheters, and it is the same purchasing and distribution system at issue in all those cases. It even is, in the case of the *Brunswick* case, the same lawyers. And with all respect, it is not only the same apple, it is the same rotten apple.

These claims are claims that were tried by a competitor called RTI against BD. It went to trial and the exclusionary contract claims were rejected by the jury and the motion to overturn that verdict was rejected as a matter of law. Likewise, the claims that BD engaged in deceptive anticompetitive conduct in violation of the antitrust law was rejected by the Fifth Circuit as a matter of law. Same case and I submit, your Honor, the same result.

So now let me turn to some specifics, if you would turn with me to Slide No. 3. This is our attempt to depict what basically is the purchasing of BD products at issue here. BD is the manufacturer, obviously. You have the four distributors who are named as defendants, and, of course, there are numerous other distributors. They are the direct purchasers from BD. They then turn around and resell BD products and, of course, all sorts of other medical devices to hospitals and health care providers. They are the indirect purchasers.

Now, where the hospital, the health care provider, the indirect purchaser is seeking recovery on the antitrust laws

for having to pay prices passed through their distributor that were allegedly excessive and anticompetitive, for some reason -- in this case, exclusionary contracts -- it is the intermediary, a wholesaler, a distributor, a dealer, sometimes a retailer. They are the only ones who have standing to bring a claim.

Here's what the Seventh Circuit said in *Paper Systems*: The right to sue and the right to collect overcharged damages is, quote, concentrated in the hands of the initial buyer.

Why is that? Well, the Supreme Court declared in *Illinois Brick*, when it established this rule, that they had a, quote, legislative purpose and that was to create a group of private attorneys generals to enforce the antitrust laws.

Who were those private attorneys generals under this scheme? The direct purchasers. In this case, it would be the distributors.

Why? The Court's reasoning was to maximize enforcement and deterrence. And the idea was it will avoid the courts and juries and parties wrestling what could be difficult questions of where did the overcharge go. The distributor sells to a pharmacy. A pharmacies sells to a patient. A patient submits an insurance form, or in the case of bricks, it goes from the brick maker, to the contractor, to the subcontractor, to the consumer. And the Court's said, We're not going to allow that to go on because that's going to result

in fewer recoveries and less enforcement. That was the policy.

Now, bear in mind, the Supreme Court also said in *UtiliCorp*, when it was asked to revisit *Illinois Brick*, that the Court is not going to countenance exceptions and deviations just because maybe the policy prescription doesn't necessarily imply in every case. The Supreme Court shut the door on these claims. And the rule applies even if the intermediary passes 100 percent of the, quote, overcharge on to the end user. That's *UtiliCorp* and that's *Brand Name Prescription Drug*.

The rule applies even if the intermediary makes a profit. The Courts have entertained arguments where a hospital or a health care provider or an end consumer says, gee, the distributor is actually coming out ahead here because they are buying product from a monopolist or an exclusionary actor, charging exorbitant prices, and then they are passing it on to me with a markup. Distributors are coming out ahead. Why should they be the plaintiffs? Courts have held over and over again even if 100 percent is passed on with a markup, the claim belongs to the distributor. That's *Brunswick*. That's *In Re: Hypodermic*. That's every GPO case.

And it's true -- that is, the rule applies -- even if the intermediary doesn't sue. It was directly addressed by *Illinois Brick* itself at the Supreme Court when it established the rule. It said direct purchasers may sometimes refrain from bringing treble suits, but it held its legislative purpose is

better served by holding direct purchasers to be injured to the full extent of the overcharge, including every cent of the overcharge.

So turning to Slide No. 4, this very claim against this very defendant has been twice litigated. It was litigated up to the Third Circuit in *In Re: Hypodermic Products*, and it was litigated in the Southern District of Georgia in a case brought by Mr. Berry involving the same contracts, the same GPOs, the same products, the same distributors. And as you can see and as I'm sure you read, in each case the Court held that because the hypodermic products -- that's BD's products -- passed through at least one other stage in the chain of distribution before reaching the health care providers, like plaintiffs here, the distributors, not the health care providers are the direct purchasers, it says, in contract sales. That's a reference to sales under GPO contracts.

Brunswick reached the same outcome.

Now, as you probably already saw because we made much of it, it is not just -- this was not just the holding in BD cases. And if you turn to Slide 5, I have laid out each of the cases that we're aware of in which a court has been asked to examine whether or not exclusionary contracts by a supplier that are sold through a distributor give the health care provider standing to sue.

Same case, same construct, same issues every single

time. The courts, including the Third Circuit, the Eleventh Circuit, and the Ninth Circuit, as well as several district courts have ruled that health care provider has no standing.

So that takes us to the plaintiffs' case.

Slide No. 6, your Honor.

So this is a portrayal of what the claim is here. The claim is that the GPOs and BD enter into what they call -- obviously not what I call, but what they call exclusionary contracts; that is, contracts that through various discount regimes and pricing programs allegedly cause customers to buy only BD. That's the claim. That's the claim that was tried in Texas and rejected, but that's the claim.

What do those GPO and BD contracts provide for? And this is critical. They do not set the price paid by the hospital or health care provider. What are negotiated between the GPOs and BD are the prices that BD will charge the distributors, what are called dealer prices. That's what's negotiated.

Of course, as I've indicated here on the dotted line and is uncontested, it is the ultimate customers that the health care providers, hospitals, who are represented by the GPOs, that negotiate these prices. But the price is to the distributor. And as I indicate on this chart, it is the sale of BD products to distributors at those prices that constitutes the alleged overcharge. That is, that is allegedly an

anticompetitive, inflated price because BD is using allegedly anticompetitive means. That's the overcharge.

Separately and distinct from that, the distributors then enter into contract arrangements with their end use customers, health care providers like the plaintiffs, hospitals, clinics, surgical centers, on and on, in which they pass on the price that they paid BD as part of whatever it is they charge to sell the BD products to their customers.

So this, your Honor, is the paradigm of the claims that we saw described as prohibited by *Illinois Brick*. It is the same claims as in the prior BD cases and all the others. Exclusionary anticompetitive conduct, No. 1, leading to overcharges to the immediate buyer, the distributors, that are then passed on to the indirect purchasers in whatever the distributor charges.

So how is it possible, what is different about this case from *Brunswick*, *In Re: Hypodermics*, and the other cases in the line?

I submit nothing of any legal substance.

Obviously, it was not lost on us that the plaintiffs have erased and whited out from their pleadings the words "overcharge and pass on" -- we know why -- and they've inserted liberally the word "conspiracy." And I'm going to get to that in a second.

I should tell you and I think you are aware of this.

They tried the exact same tact with Judge Wood in the *Brunswick* case. They argued in opposition to a motion to dismiss that there was a conspiracy exception. They argued it, she denied the motion.

They then said, Well, let us amend, and that amended pleading, which we've submitted to your Honor, looks like this pleading. They erased and whited out the words "pass on and overcharge." They sprinkled in conspiracy, and Judge Woods said, No. You are not entitled to amend. It would be futile because it would be dismissed because the legal substance is the same.

That is the same here. And, in fact, it is the same with respect to adding as defendants the distributors and the GPOs. They are props in an argument for getting around the law.

So how is it that I say that the substance of the allegations and the substance of the alleged damages are the same as in all the other cases? Well, it is admitted in the complaint itself.

Paragraph 42: BD agrees with customers, the plaintiffs, via their GPOs on what it will charge the customer's distributor. That's Paragraph 42.

Two, separate and distinct the consumer then selects a distributor to buy from. It's Paragraph 44.

Third, the consumer then negotiates a distribution

agreement. It doesn't involve BD, nothing to do with BD. The consumer then negotiates a distribution agreement with the distributor for the amount the distributor will charge to sell its medical supplies, including BD products.

So we have separate -- we have two separate transactions. We have two separate purchases. We have two separate sales: BD to the distributors, the distributors to the hospitals.

Where do I find all this? Slide No. 7, your Honor.

This is in Paragraph No. 2 of their complaint. At the very front, they lay out precisely what I just summarized for you step by step. What happens first in this marketplace? The health care provider -- that's the plaintiff -- becomes a member of a GPO.

What's a GPO? It is a voluntary buying group. It doesn't buy anything, it doesn't sell anything, it's a negotiating agent. Obviously, every clinic and hospital in the country is not going to negotiate with every medical supply company and pharmaceutical company for everything they need, so they form buying groups. The plaintiffs refer to them as the agents of the plaintiffs and other members.

What do they do? Step 1: The GPOs negotiate prices for the supplies with manufacturers. Those are the ones that establish the dealer price.

Step 2: The GPOs, representing many health care

providers, negotiate pricing for devices and supplies. Same point. And those are the prices, the servers.

Step 3: A health care provider wishing to purchase medical device and supplies -- obviously, not just BD -- then does so through a distributor authorized to sell the goods.

That's the system. That's exactly the same system as in *Brunswick*, as in *In Re: Hypodermics*.

Slide No. 8, your Honor, just to refine and emphasize the point further. And this will become critical to their exception argument in a moment. The distributors have nothing to do with setting the price charged by BD. These are their words in the amended complaint, Paragraph 44: Once a health care provider decides to purchase Becton products, it selects -- the health care provider selects a distributor, such as Cardinal, Owens & Minor, McKesson, or Henry Schein to deliver Becton's products. GPO negotiates a price, health care provider picks a distributor to buy from.

I didn't put it on the slide, but the next point, also in Paragraph 44, is that the distributors and the health care providers then enter into a distribution agreement.

And then as indicated on the slide, the distributors then -- that is, the distributors -- purchase products from Becton and then resell the relevant products directly to health care providers pursuant to terms negotiated by the GPOs, the exact same allegations in all the other claims. The

distributors buy from BD. They are the direct purchasers. They then resell downstream to their customers and pass on the cost of what BD charged, plus whatever else the distributors charge.

Whatever the distributor charges not part of the BD contract, not negotiated with BD, whatever BD charges to the distributors, not part of the same contract. Separate transactions, separate sales, separate direct purchaser and indirect purchaser.

So looking at Slide No. 10, I've summarized for your Honor some of the cases that have addressed this very distribution system. And as the Ninth Circuit said in valley -- *Delaware Valley Surgical Supply*, the Court has closed the door on the theory that an end user who buys from an independent distributor should have standing.

The Court in *Warren General Hospital* likewise explained why indirect purchasers have no standing. Quote, the purchasers go through at least one other stage in the chain of distribution before reaching *Warren General Hospital*, and, therefore, the situation before us is akin to the facts in *Utilicorp* and *Illinois Brick*.

Lastly, on this chart, the Eleventh Circuit, in another health care medical supply case: Although the distributors may have passed on to the medical center some or all -- or even all of the overcharge that they, the

distributors, paid to the manufacturer, the medical center cannot recover damages from the manufacturer for that overcharge because it was the second purchaser of the product.

And that takes us to plaintiffs' argument, its third bite at this apple.

So it is the same admissions, your Honor, about how these products are contracted for, priced, and purchased. It's these exact same admissions that close the door on what they refer to as the conspiracy exception, which is what they're here arguing today.

Of course, they argued it before, before Judge Wood in the *Brunswick* case, and she rejected it. And it should be rejected for the very same reasons, that the distributors do not participate with BD in fixing the price that they, the distributors, resale the products to customers. And that's critical, and I'll get into it. But, rather, the distributor passes on the cost of BD products as part of its price that it determines independently, not only independent of BD, but in negotiation with the plaintiffs.

And so the pleading, your Honor, not only lacks the allegations necessary to establish standing, it negates them. So let me just explain for a moment what this exception is. It is a little bit of a misnomer. I'm not running from the word. But what the cases really hold is there are certain times when *Illinois Brick* just doesn't apply. It is not a carve out from

the rule. It's that the rule doesn't apply.

And when is that? That's where there is not a passed on overcharge.

When is that? If you turn to Slide 11, your Honor, we have laid out in text and graphic form. And I've quoted from Areeda for two reasons. One, it's the universally accepted authority on antitrust law. It's also cited on this subject by the Seventh Circuit in *Paper Systems*, a case the plaintiffs rely on to some extent.

And here's what it says, and this goes to my point that it's not really an exception. Areeda says, *Illinois Brick* does not limit suits by consumers against a manufacturer who -- against a manufacturer who illegally contracted with its dealers to set the latter's resale price. That's the exception, the carve out, the situation where *Illinois Brick* doesn't apply. That is, the manufacturer and distributor are acting as a single economic entity. And what are they doing? They're determining what the price is that the end user will pay. Call that retail price fixing, call that resale price maintenance, where the dealer and the manufacturer are in bed setting the final price. Then all you have here is basically one transaction. There's no passing on of the manufacturer's cost as part of the distributor's charge. They've already decided what the distributor is charging because they got together to fix that price. So there's no overcharge being

passed on. There are no two distinct sales. There is effectively one transaction the sale to the customer at the already fixed agreed price. And in that case, as the courts hold, the consumers' damages, it's not the overcharge, it's the fixed price.

And what's the policy reason for why *Illinois Brick* wouldn't apply in that case? Well, go back to the original purposes of *Illinois Brick*. There's no issue of tracing, allocating, apportioning, discerning, discovering how much of the manufacturer's overcharge got passed on to the customer because it wasn't an overcharge. It's because the price to the customer was fixed and already agreed before the distributor sold the product. And in that case, a case of resale price-fixing, there's only one party who's paid any illegal price, and that's the customer.

So where do you find support for that? I go back to Areeda. This, I haven't put on a slide for you, but I brought copies and I'll leave it with the Court because I think it will be helpful. The rule at play here is explained by Areeda, and it's cited by the Seventh Circuit in *Paper Systems*. And here's what Areeda says. *Illinois Brick* does not limit suits by consumers against a manufacturer who illegally contracted with its dealer to set the latter's -- the dealer's -- resale price. Why is that? Again, I read, where the dealer and the manufacturer agree in advance on the very price to be paid by

the consumer there is no problem of duplication or apportionment because the consumer is the only party who has paid an overcharge.

Now, that's in contrast to what is happening here and has happened in all the other cases that have ruled on this where the distributor or wholesaler is the party paying the overcharge then turning around in a separate transaction, under separate agreement to charge a price to the hospital or health care provider a price that's a function of that agreement not involving, in this case, BD.

So it is that situation -- again, I'm reading from Areeda -- that is outside *Illinois Brick's* domain because, quote, there is no tracing or apportionment. And just to go one step further to understand this, Areeda goes on to explain -- I'm going to quote again: Further emphasizing that *Illinois Brick* does not apply where the dealer and the manufacturer set the resale price is that were the distributor to challenge the price imposed on it by the manufacturer, it would not be seeking an overcharge.

So imagine a situation where -- which is different from ours -- where there's a predetermined resale price to the consumer. If the distributor were to sue in that case, it wouldn't be for the overcharge, it would be for having to charge too much to a consumer and thus losing sales. So in a case -- which is not this case, but it is the only situation

where the indirect purchaser rule doesn't apply. The end user in that case has the overcharge claim, the distributor doesn't even have an overcharge claim because they already agreed to that price.

So every case that has looked at this issue, every case that has applied either this exception or concluded that *Illinois Brick* doesn't apply -- and there are not many -- has been a resale price maintenance price-fixing case for the reasons Areeda explained. And on the facts, as admitted, as alleged by the plaintiff, that exception, that principle does not apply.

Why? Because the price from BD, the price that -- the price that's negotiated by BD and the GPOs does not involve the distributor. They admit that. They don't show up until after -- after when the health care provider selects its distributor, after a health care provider negotiates a distribution agreement. The distributor has nothing to do with BD's price other than paying it and passing it on.

And that occurs after the health care provider selects the distributor and after they charge; that is, the distributors charge the health care providers whatever it is they charge under their own distribution agreements. The distributors have nothing to do with BD's prices, BD is not involved in the distributors in setting their charges to their customers.

So, Slide No. 12, your Honor, just to bring this full circle, this very argument, your Honor, was made to Judge Wood in the *Brunswick* case. It was argued, it was rejected, and it was based on the exact same agreement between BD and the distributors, this dealer notification agreement. That's the agreement under which BD authorizes distributors to sell its products. That's what this agreement is. That's what they argued in that case and they're arguing in this case, means that *Illinois Brick* doesn't apply.

Judge Wood found in a decision that we obviously have provided, your Honor, that recognizing that they argued it before her, that the dealer notification agreements between defendant distributors supposedly bring this matter within the vertical conspiracy doctrine, the complaint fails to provide any plausible support.

Why? In exactly the same reasons here. This is what Judge Wood found. This is 159 F. Supp. 3rd 1361. Crucially -- crucially -- plaintiffs assert that the two, BD and the distributor, enter into an dealer notification agreement defining their relationship pursuant to the terms of the net dealer contract. That's the GPO contract. Exact same allegation as here. And they allege -- that is, the plaintiffs then, as they do now, that the agreement between BD and the distributor incorporates, and I'm quoting from her, the pricing rebate bundling penalty and sole source provisions in the GPO

contracts. Exact same allegation as here. Thus, she concluded, the plaintiff's complaint demonstrates and expressly acknowledges that the contracts linking the defendant, the distributor, and the provider are essentially negotiated between the defendant and the GPO, not the distributor. Therefore, the exception for resale price-fixing is inapplicable and, in fact, is negated by the allegations.

Slide No. 13, your Honor, I've just put together. I won't read them all, but we've summed up in one place to illustrate how the allegations here are substantively indistinguishable from the allegations made in *Brunswick*, that BD and the GPOs are the ones that set BD's prices, that the distributors have no role in the setting of BD's prices, and, therefore, the so-called conspiracy exception couldn't possibly apply. And critically essential to the application of *Illinois Brick*, the distributors then pass on BD's prices through their own distribution agreements and charges to the consumers.

And I'll close by coming back to *Utilicorp,* your Honor. *Utilicorp* was a case, the third in the line of the trilogy where plaintiffs, that is, consumers of public utilities argued that they should have standing to sue natural gas suppliers because under statute and regulation 100 percent of what the natural gas supplier charged the utility was passed through the consumers. And so the lawyers for the consumers said there's no reason why the consumers shouldn't be allowed

to sue because the whole thing gets passed through. There's no tracing problem, there's no apportionment problem.

The Supreme Court said no. They specifically said that even if the principles and rationale and reasoning and prudential concerns lying behind *Illinois Brick* do not apply, quote, in equal force in every case. They said the rule is ironclad. And they closed by saying our stated decision not to carve out exceptions to the direct purchaser rule is immutable.

And for those reasons, as the courts have already found over and over again, we respectfully submit that the antitrust claims against BD be dismissed.

THE COURT: All right. Thank you, Mr. Atkins. That was helpful.

MR. ATKINS: Thank you, your Honor.

THE COURT: Now, Mr. Molo, if you would like to respond as best you can just to those arguments.

MR. MOLO: I would, your Honor, thank you very much. And thank you for having us here this morning, setting aside this much time for what is, indeed, a case that involves a lot of parties. I don't believe it is nearly as complex as is being portrayed, and hopefully you will agree with me after we finish the morning here with all of us speaking.

The question, by the way, I just want to start with is that, you know, it's not a question of whether or not we've proven an antitrust violation here. We need only provide

enough detail about the subject matter to present a story that holds together. That's the pleading standard. The question is could these things have happened, not did they happen. And we've met that standard.

First of all, we have standing. The plaintiffs here, my clients, are health care providers who have purchased Becton's syringes, catheters -- and catheters from the defendant distributors, and they are a part of the class of the first non-conspirators in the distribution chain, and that gives them standing.

The Seventh Circuit law is absolutely crystal clear on this. The first purchaser outside the conspiracy has standing to sue for damages.

And that's precisely what occurred here. And when you think about it, Judge, if you did not allow that, if you said we did not have standing, the defendants' conduct could never be redressed through a private action. And that's contrary to the Congressional intent, which has been affirmed many times by the courts saying that we encourage private enforcement of the antitrust laws.

I mean, what they are saying to you today is that there can be a conspiracy among manufacturer, other middlemen, intermediaries, and the first person that is outside of that conspiracy can't bring a claim for damages. And that just can't be, and that's inconsistent with the law. *Illinois Brick*

says nothing more than the first non-conspirator in the distribution chain gets to recover against those who unlawfully raise prices through anticompetitive conduct.

Now, the *Illinois Brick* case, Judge, I think it is illustrative and illuminating to understand where it comes from. There was the *Hanover Shoe* case that preceded it, where a defendant had argued, I shouldn't be liable for all of the damages that this first purchaser is seeking from me because that purchaser is passing those increases on to further people that that purchaser sells to. And the court just said, no, that's too complicated. The analysis is too complex. We are not going to go through and insist on this sort of apportionment. We are going to limit it and not allow that as a defense.

Illinois Brick comes after that and applies that same analysis of the plaintiff's side, and it says, We are not going to allow there to be plaintiffs who are further down the distribution chain bringing claims and requiring courts to go through and apportion where the damage really lies, who is really entitled to those damages.

So what *Illinois Brick* says is, if you are the first purchaser outside the conspiracy, you are entitled to recover 100 percent of the damages. And joint and several liability again conspirators makes sense for that. It is not a complicated analysis. You don't have to go through a great

deal of struggle to get to a fair result.

Now, the defendants are saying that *Illinois Brick* says that multiple parties at different tiers in the distribution claim -- chain cannot be held liable, and that result would be absolutely absurd. The Seventh Circuit, on multiple occasions, has held that where manufacturers and intermediaries -- which is what we have here -- are alleged to be conspirators, *Illinois Brick* does not prevent the first non-conspirator in the distribution chain from recovering damages.

The case that gets cited most often for this proposition is the *Paper Systems v. Nippon Paper* case, Judge Easterbrook's opinion. And in that case, the plaintiffs had alleged a conspiracy among manufacturers of paper, distributors of paper, and something called trading houses. And the district court dismissed and said, no, *Illinois Brick* prevails, and the plaintiff can't -- it was a ultimate purchaser -- couldn't bring the claim. Seventh Circuit reversed. Judge Easterbrook very clearly said the first purchaser outside the conspiracy may sue for damages. There is no tracing or apportionment issue in *Paper Systems* or here, because, again, all of the conspirators are jointly and severally liable. It's fundamental, it makes perfect sense, and its the law.

Now, Becton has come here, and they've invented some

limitations on how *Paper Systems* works or they're claiming how it works that just are not the law. They claim that standing is limited to when conspirators form a single economic enterprise, whatever that means. And there's no such case. There's no limitation on any case. And, in fact, Professor Areeda, who we heard my friend from Paul, Weiss citing repeatedly just a few moments ago, says there is no such limitation.

They also claim that there is a limitation to situations where there is vertical price-fixing, where everyone in the distribution chain gets together and says they are going to charge the price, and that, too, is not the law. And, again, that would not make sense. It would be contrary to this fundamental point of *Illinois Brick* that the first purchaser outside of the conspiracy can sue and can recover 100 percent of the damages.

You know, Becton misstates the *Fontana* case, another Seventh Circuit case, that one written by Judge Pell. And *Fontana* did not announce a rule that standing is conferred on the first purchaser outside the conspiracy only in cases involving price-fixing conspiracies. The defendants, by the way, rely on an incorrect cite to the district court opinion. For the sake of completeness, I'll just give it to you. It's 460 F. Supp. 1151, 1660. That clearly does describe the conspiracy there.

And *Fontana* involved allegations by an airplane parts dealer, that Cessna, the manufacturer, and its distributor had conspired to drive dealers out of business through bundling schemes, false advertising, refusals to deal, and other anticompetitive conduct. It was not a price-fixing case. And other courts have recognized that the standing of the first purchaser outside the conspiracy cases is not limited to price-fixing cases. We cite in our brief the *Insulate* case, which is an Eighth Circuit case, and the *Lowman* case, which is a case out of the Southern District of New York, which is a market allocation. Both of those are market allocation cases.

Now, the defendants wrongly rely on this *Brunswick* case. If I can have -- I have some slides here that may aid the discussion.

THE COURT: If we can maybe put them on the ELMO.

Deana, do we have --

MR. MOLO: Yeah. We have them right there. And we have a hard set for you.

THE COURT: Okay, sure.

MR. MOLO: So the *Brunswick* case, which we've heard about quite a bit already this morning, was not a Section 1 conspiracy to restrain trade case, which is the case that's before you. It's a Section 2 monopolization claim that required proof and sufficient allegations of specific intent to monopolize.

Here, a Section 1 case, a restraint of trade can be proven through either unlawful purpose or anticompetitive action if it is enough to allege that the parties knowingly and through concerted action occurred -- the restraint of trade occurred and it was contemplated and invited, and the parties agreed to do it.

It was a case involving true indirect purchasers from Becton. It involved a cost-plus exception argument, which I know this Court's familiar with from your case in *First Impression Salon*. So you, I think, are not being completely candid in saying that you are unfamiliar with antitrust laws. But that was a cost-plus exception case. It was not a case like this case where there was a conspiracy. And there was no conspiracy allegations involving the dealers.

So what we have here are detailed conspiracy allegations involving every party in the distribution chain up to us. There is no cost-plus exception. And we are, in fact, the direct purchasers from the conspiracy. So *Brunswick* was a very different case. And I also want to add, too, there was different parties, different claims. There is absolutely no precedential or preclusive effect.

THE COURT: Well, that's certainly even because it is a district court decision. But so I guess where can you point to me in the amended complaint where the plaintiffs allege that the GPOs and the distributors entered into agreements with a

meeting of the minds for an unlawful arrangement?

So you seem to be saying that this is different because they're actually in a conspiracy, but it looks like they just adopted the terms of the net dealer contract, that that goes down the line. So explain that to me.

MR. MOLO: You take me to where I want to go, which is a bit beyond where they left off and --

THE COURT: Okay.

MR. MOLO: -- and I'm glad you did because I want to explain to you how this conspiracy works, and I think that's what you are asking me, if I may.

THE COURT: Yes.

MR. MOLO: So let me start where it ends, okay. Where does it end? It ends with the antitrust injury. Becton sells commodity products -- commodity products, syringes, catheters. Their pricing is as much as 37 percent higher than what the competitive pricing is. That's alleged at Paragraph 39 of the complaint.

They get that through market share of 60 percent of the conventional syringe market, safety syringe -- 60 percent in the safety syringe market, and 55 percent in the safety catheter market. This doesn't happen by accident. The commodity product like this, to have this kind of market share and this kind of pricing is -- the only way this is happening is through this conspiracy.

Now, there's three categories of participants, as we talked about. First, there's Becton, the supplier, which manufactures this commodity product. It contracts with the group purchasing organizations for inflated prices at restrictive terms. It then -- Becton contracts with distributors to sell at inflated prices and enforce those restrictive terms. It makes anticompetitive payments to the group purchasing organizations that it calls administrative fees, and it requires the distributors to make payments to the GPOs, and it also pays the distributors as well. And it reaps tremendous profits as a result of both the volume and the pricing that it's able to extract.

The group purchasing organizations are effectively the dishonest brokers here. Their job ostensibly is to negotiate on behalf of the health care providers. Now, you might think, well, boy, that's really a tough job because you have got the big bad manufacturer of Becton, you know, and they're just not going to be a pushover.

In fact, these two GPOs who are defendants here, these group purchasing organizations, they control 75 percent of the health care spending in these markets in the United States. They should be able to come in there like Jimmy Hoffa in a labor negotiation and be able to -- you know, Becton should leave the room weeping.

And what happens?

This is what happens: As a result of that negotiation, supposed negotiation, we result -- we end up with prices that are 37 percent above market. That doesn't happen if the GPOs are actually in there and negotiating hard and not being rewarded for laying off as they were. They receive a percentage of the sales as payment from Becton, and they get these payments from the distributors.

The last party in this are the distributors, and they're effectively the enforcers. They agree to sell these products at the inflated prices. They agree to enforce these restrictive terms, which are the sole source and dual source terms and the penalty pricing. And the way those work is, the GPOs have negotiated these terms, and there's ostensibly some kind of a discount.

In fact, if a customer buys from a competitor of Becton, they are punished mercilessly by saying if it's a -- even where it is a dual source, if it's more than -- if they go to a second source and it is more than 5 percent, they end up having to pay extraordinary penalties that make this a very unattractive economic proposition, so they are forced to limit themselves to these contracts.

And the distributors receive -- they make their money from both the volume of sales and an increased price, so an increased price benefits them. They're aware of those terms because they're enforcing the terms that the group purchasing

organizations have negotiated. And Becton actually pays the distributors -- this is all alleged in the complaint -- pays the distributors' employees so-called bonuses for providing visibility for compliance with these restrictive terms, making sure that things are being done as Becton wants them done, and also for advertising Becton as opposed to competitors' products. And the distributors then make payments to the GPOs as well.

So how does this conspiracy work? You have there Becton at the center engaged in these contracts, setting the inflated prices in the restrictive terms with the GPOs, who are supposed to be negotiating hard, but as we know are negotiating prices that are 37 percent above the market and allowing Becton to get 60 percent of the market share. And then we have the contracts between Becton and the distributors, and those contracts are to enforce the inflated prices and the restrictive terms.

This together results in what you see as the circle here, inflated prices and restrictive terms that if the providers, the health care providers, the purchasers, want to purchase the Becton products they have to go through, accept, whatever word you wish to use, be subject to the inflated prices and the restrictive terms. That's how the conspiracy works. These parties together.

Now, I think what you were asking me before was, what

it is the evidence or at least what's our allegation that they all knew what each other was doing? And that's not conspiracy law. Conspiracy law is that if there is, in this case, the improper purpose by Becton to engage in the anticompetitive conduct and it's contracted with the distributors or agreed with the distributors to do the things that they are doing and agreed with the GPOs, each need not know every detail of what the other does. It's no different than in a narcotics conspiracy where, perhaps, the manufacturer of the narcotics -- and I'm not doing this in a disparaging way, but I'll just say that's Becton, okay. It may know what its distributors on the street are doing, and it may also be paying off a dirty policeman or a policewoman on the side as well. And the distributors need not know all of the details about that, and the dirty policeman need not know all of the details about what the distributors are doing for there to be a conspiracy.

And in a Section 1 conspiracy, antitrust conspiracy, again, it's merely this anticompetitive conduct, and the law's pretty clear on this too. You need not even actually go out there and aggressively engage in the conduct if you merely acquiesce and you are aware of what's going on.

So at the worst case, I would say that's what happens with the distributors, that they merely acquiesce, but they actually do much more than that. They act, as the case law talks about, and we cite in our brief as a "cat's paw," a term

I don't particularly like, but it's the term they use. But they are the enforcer. They go out and they make sure these things happen and the payments go around.

And so talking about it -- and, by the way, here are these contracts. The evidence goes beyond the contracts. The Becton and the group purchasing organizations have what they call a net dealer contract, and that sets the prices, has the penalties, and has these requirements. And these contracts, by the way, are all long-term. They're usually for five years. So this is really, really, you know, punitive. You are locked into that.

Then there is the dealer notification agreement between Becton and the dealers, where the dealers agree to enforce Becton's terms, and the dealers agree to pay the GPOs. So there is contact and conduct between the group purchasing organizations and the distributors.

And then there's the distribution agreement between the distributors and the health care providers, the purchasers, which subject the providers to the restrictive terms. They charge the -- you know, the inflated prices and they have these long-term contracts.

So how does the money then work within the conspiracy? So these inflated prices are paid by the health care providers. Becton pays -- reaps these enormous profits. They pay what they call administrative fees, millions and millions of dollars

to the GPOs. How someone who is supposed to be negotiating with an iron fist on one hand is also paying money to the opposing party in the negotiation, and that be competitive or fair or honest is beyond me. But there are these millions and millions of dollars in administrative fees paid by Becton to the GPOs.

Becton pays the distributors. The distributors are paid partly through the sales, but as I said, their employees are paid as well these special bonuses. And then Becton, for some reason, requires the distributors to make a payment to the group purchasing organizations. So everybody gets a cut of the action. Everybody stays happy. Becton gets the -- pays the administrative fees to the group purchasing organizations. The distributors pay the group purchasing organizations per Becton's requirement, and Becton pays the distributors, the employees to monitor compliance with the scheme.

Everybody is happy except the people that are having to pay 37 percent over what would be a competitive price had there not been a conspiracy here. These are rotten deals that are negotiated with the sole purpose of defeating competition, foreclosing other people from the marketplace. That five-year term makes it impossible for any competitor to come into the marketplace and fairly compete, and Becton reaps huge, huge sums, as do these other parties.

You know, they make some points in the briefs about

the nature of the conspiracy, whether it's a vertical conspiracy, whether it should be a horizontal conspiracy. The Supreme Court law here is very clear, and it goes right to this issue. And I'm quoting from the *American Tobacco* case right here, it's up on the screen before you, where it says it is not the form of the combination or the particular means that's used but the result to be achieved that the statute condemns.

And the result to be achieved here is that 37 percent above competitive pricing that we've alleged. There's no formal agreement necessary to constitute an unlawful conspiracy. You don't have to sit down and, you know, write on parchment paper and put wax and ribbons and say, you know, we've all agreed to conspire, and we are going to restrain trade. And as the Court said, the Supreme Court said in *American Tobacco*, where the circumstances are such as to warrant a jury finding in that the conspirators had a unity of purpose for a common design and an understanding or a meeting of the minds in an unlawful arrangement. And we allege that throughout.

This conspiracy is plausible on its face, and that's all we need to prove. It's plausible in that there are, first of all, these inflated prices for the commodity products. It's plausible because there is this extraordinary market share for commodity products. It's extraordinary -- and it's plausible because the group purchasing organizations have gotten this

terrible, terrible deal, despite having 75 percent of the market, having gotten this terrible deal.

The contracts are long-term. The contracts impose these extraordinary disloyalty penalties. There are overlapping participants. There are common contracts that these parties have. These distributors are using the same source of contracts. They have the identical goal of stifling competition and lining their own pockets. These contracts require Becton to be the sole or one of two sources. And they require the distributors to make the payments to the GPOs, the payments of millions and millions of dollars in so-called administrative fees that I just mentioned, the payments of these bonuses, and that Becton requires the distributors to advertise these products over the competitors.

So I want to make clear that it is not just these contracts that we are claiming are the conspiracy, they're evidence of the conspiracy. But the conspiracy is this agreement, this system that these folks have landed on through much effort and calculation, and it's rewarding them. And what they are trying to say is that notwithstanding the fact that the GPOs, Becton, and the distributors are all connected in this, they're all reaping huge dollars from this. They've all entered into this with a clear intention of foreclosing competition and driving up and getting these extraordinary prices; that not withstanding that, the health care providers

cannot sue. And that's wrong.

Illinois Brick just doesn't say that. *Illinois Brick* says that the health care provider, the first purchaser outside the conspiracy has standing. That's us here. We've stated a claim for a conspiracy. We have standing to bring that claim, and we would like the case to move forward to discovery.

THE COURT: Okay. One question I had --

MR. MOLO: Sure.

THE COURT: -- when I came in, and I think you have answered it. But so the Supreme Court says that at the motion to dismiss stage, the determination turns on whether the defendants had any rational motive to join the alleged conspiracy and whether the conduct alleged was consistent with the defendants' independent interests.

So what you are saying here is that their motive is that everybody is making money, and the health care provider is paying more.

MR. MOLO: That's right.

THE COURT: Okay.

MR. MOLO: And we know what health care costs are in the United States, and this is why these things are happening. Right there, the slide that's before you -- excuse me -- the slide that's before you indicates the money that each of them is getting and which is all alleged, as we say, it's got citations to each paragraph of the complaint where it's there.

But that's how the conspiracy works. That's why we have standing. And, again, if we didn't have standing here, you would be saying that this kind of conduct could not go redressed absent a government enforcement action, and that is not what the antitrust laws were designed to allow.

THE COURT: Well, but he put up a whole bunch of cases where -- that all go against you, so how is this --

MR. MOLO: No, they don't. No, they don't.

THE COURT: Okay.

MR. MOLO: And the reason they don't is the cases that he's citing are monopolization cases. They're Section 2 cases. They're not cases like the case that we've brought, this Section 1 case, which is this restraint of trade case. And Mr. Ellis, my partner, will address the other two arguments. Some of it will probably have been addressed by what I've talked about.

Okay.

I'm happy to come up and answer any more questions that you have whenever you'd like.

Thank you.

THE COURT: Okay. All right. Well, let's move on to --

MR. ATKINS: Your Honor, can I respond --

THE COURT: You can respond briefly.

MR. ATKINS: Yes. And we can take care of standing.

As to this, I suppose it is a policy argument about if this goes unlitigated, there is not going to be anybody to redress this conduct. Well, first of all, let's set aside the fact that there was a trial about these very contracts and these practices so -- by a competitor. So there's absolutely not only in concept a mechanism for alleging redressing it, but, in fact, it happened, it just turned out that Becton, Dickinson prevailed.

No. 2, to the extent that Marion Healthcare really wants to bring a claim and relitigate that case, they absolutely have recourse to the courts under Illinois law because Illinois, like 25 other states and the District of Columbia, has what's called an *Illinois Brick* repealer statute. So there is a -- they could sue. If they want, they can sue BD and bring a claim, exact same claim, treble damages, under Illinois antitrust law because the Illinois legislature said we are going to create a state law to give folks like that standing because -- precisely because -- precisely because the federal law under *Illinois Brick* does not give them standing. So they're not out of court.

The only reason we're here, your Honor, is because somebody other than these named plaintiffs wants a nationwide federal antitrust case. We can all speculate as to why, why Georgia wasn't the end of this. But if Marion wants its day in court, it can have it, and, you know, I'm happy to set a trial

schedule.

So that's on the policy issue.

On the issue of whether or not uttering and arguing, making these jury arguments about a conspiracy grants standing, I didn't hear a citation to any authority for that. And I didn't hear an answer to the law that says the only time *Illinois Brick* doesn't prevail, doesn't govern is when the retail resale price to the end user is set between the manufacturer and the distributor. For all the slides and arguments and pictures, there was no answer to my assertion and the fact based on the -- and based on the pleading that this is about a passed on overcharge. Cases about passed on overcharge are prohibited by *Illinois Brick*.

Now, he cited *Paper Systems*. *Paper Systems* is useful for several reasons. One, as I said before, *Paper Systems*, in discussing the so-called conspiracy exception cites to as authority the Areeda provision I read to you. I now have copies I will leave with the Court. I will not reread it. But *Paper Systems*, at 281 F.3d 632, in discussing it cites that. And, of course, it is a resale price maintenance case.

Let me -- if, your Honor -- if I could, how do I activate this?

COURTROOM DEPUTY: I will take care of that, just a moment.

MR. ATKINS: Thank you.

Your Honor, rather than taking time to pass these out -- although I think I will because the color is important. If I might, your Honor.

THE COURT: Mmm hmm.

MR. ATKINS: *Paper Systems* is like a seminar in the direct purchaser rule. It involved a price-fixing conspiracy, as do all the other cases that apply this so-called exception. The entities in red and connected by the red lines were the parties to this price-fixing conspiracy. If there was any doubt, they pled guilty to criminal price-fixing, which, of course, invited this lawsuit, not the one we are here on today but *Paper Systems*. And each of these three columns represents a different sort of species of the direct purchaser rule.

Nippon sold to distributors, Japan Pulp and Mitsui. Those distributors were deemed to be the direct purchasers, and the indirect customers of Nippon had no standing. Kanzaki and Appleton, also price-fixing conspirators, they happened to sell directly to the customers. So those customers, unlike Nippon's ultimate customers, they had standing as direct purchasers because they brought directly from Kanzaki and Appleton.

And then here's where it gets interesting. Oji and Mitsubishi sold to trading houses, but the trading houses were part of the price-fixing conspiracy. The trading houses pled guilty to price-fixing along with the other companies.

And so *Paper Systems* citing Areeda found that in the

case of the customers of Oji and Mitsubishi, because the price to them was fixed by an agreement between the intermediary and the suppliers, acting, in effect, as a single economic enterprise predetermining, prefixing the price to the customers, there the consumers had direct purchaser standing.

So *Paper Systems* is perfectly illustrative of the reasons why the claim here should be dismissed, because there is no allegation and no argument that the distributors had anything to do with setting BD's prices or that BD was involved in what the distributors charged, ultimately charged their customers under their separately negotiated distributor agreements.

As for *Fontana*, it also helps illustrate why this claim should be dismissed. In *Fontana*, the "intermediary" buying these avionic equipment, it sued not as a purchaser but as a competitor and therefore was not seeking overcharge damages. So the court found that the intermediary does not fit within *Illinois Brick*.

Why? Because it claims to be a competitor, not a customer. Therefore, it said *Fontana* -- that's the customer -- does not seek damages for an illegal indirect overcharge passed on to it as it is prohibited by *Illinois Brick*, but it sues on the basis of the fact that it was a competitor and was allegedly driven out of the market. And its damages it was seeking for being driven out of business by another competitor

were lost sales and lost profits. It wasn't even suing for a passed on overcharge. Because as *Fontana* says, that would have been, quote, prohibited by *Illinois Brick*.

Now, as to *Brunswick* being different, *Brunswick* was about the exact same exclusionary conduct. There, it said BD became a monopoly as a result of that conduct. Here, they're arguing the exact same conduct results in the exclusion of competitors. The antitrust injury -- you saw the slide with the supposedly higher prices. It's the exact same claim, and the basis is exactly the same.

I'm reading from the *Brunswick* complaint. Paragraph 7, it's in the materials we submitted. It reads just like the litany of alleged wrongdoing by BD here. There were allegedly six schemes, it says, in Paragraph 7. Exclusionary bundled rebates -- here we go -- penalty contracts, sole source contracts -- it's the same claim -- the theft of RTI's patented innovative technology -- same claim -- six years of competitive, deceptive, and false advertising -- same claim. Same claim, same conduct, same injury, different section of the Sherman Act.

And as to whether or not the conspiracy exception was argued, I'm holding in my hand their opposition brief to Judge Wood. You can probably see a section of their brief, conspiracy exception. Hard to miss. Then it goes -- and it makes the argument of why the so-called conspiracy exception

applies. It is the same argument we just heard. The complaint alleges that Becton fixes its alleged monopoly pricing -- that's those, you know, high prices we saw -- in the exclusionary net dealer contracts with the GPOs. You just heard that was on the charts.

After a hospital decides to accept these prices and other terms, it executes a cost-plus agreement with the distributor. There's the distributor agreement. The distributor, in turn, executes a dealer notification agreement. We saw that as well with Becton. It is the dealer notification agreement between Becton and Becton distributor that brings this within the conspiracy exception. Same argument, same alleged facts, and I submit requires the same outcome.

Finally, your Honor, one, as I wrote by hand, *Brunswick*. The exact same conduct alleged here as giving rise to standing is exactly the same conduct as in *Brunswick*. I just read it -- the net dealer contract, the dealer notification agreement, and the distribution agreement -- like it was taken out of the *Brunswick* pleading.

The other thing is that alleging a series of formal agreements in connection with the sale of medical products is not an allegation of a conspiracy. Mr. Molo read it from the DOJ's guidelines that you don't need a formal agreement to prove a conspiracy, that's true. But conversely, the existence of formal agreements for the sale and distribution of profit --

products doesn't sufficiently allege the existence of a conspiracy. It says the existence of commercial contracts.

And let me close by saying -- and I hope at this point it wasn't lost. I can't imagine it was. Whether or not they have alleged some kind of conspiracy involving the distributors, we don't believe they did. The pleading is sorely lacking. My colleagues will explain why. That doesn't overcome the need to allege the type of conspiracy, the type of conduct that would in the rare, rare case create an exception to *Illinois Brick*. And that is the need to allege that the dealer and the manufacturer got together and set the price at which the dealer is going to sell to the end user.

I've read to you from Areeda. Every case that's covered this has been about vertical resale price maintenance or price-fixing because it is the only argument that makes sense, it is the only arguments that they acknowledge. This case is about a passed on overcharge, and that is barred by *Illinois Brick*.

THE COURT: Okay. Thank you.

MR. MOLO: May I just two very short points?

THE COURT: Very short.

MR. MOLO: Very short. On this -- on this Illinois Brick repealer issue, this is --

COURT REPORTER: Would you please move the microphone?

MR. MOLO: This *Illinois Brick* repealer issue, this

is -- I mean, we have a right to enforce the antitrust laws. And what about the other 25 states? They should -- those people should just go ahead and pay the 37 percent overcharge that these conspirators have had; and, secondly, on this issue of this very long-winded explanation of how *Brunswick* is so definitely foreclosing our case is just not true. As I said, it is a Section 2 case; and, secondly, the dealers were not named as defendants; and, thirdly, this cost-plus issue was being raised, it is a very, very different case.

Thank you.

THE COURT: Okay. Thank you.

Well, let's take a short break. I'm sure Molly needs a break, and we can -- I'll hear from the GPOs next. We will resume at 11:35.

(Recess)

THE COURT: Be seated.

MR. DEE: Thank you, your Honor. What we talked about at the break, we are going to be focusing primarily on the conspiracy claims for the GPOs. And the law for that is the same for the distributors, and they are going to just basically talk about how it applies to them.

THE COURT: Okay.

MR. DEE: The thought was that we would -- that I would go on behalf of the GPOs and Mr. Fenske would talk about -- go on behalf of the distributors, and then the

plaintiffs would address both of us.

MR. MOLO: These are going to be short, Judge.

THE COURT: Okay, great.

MR. DEE: So I thought what might make sense -- your Honor, Terry Dee on behalf of -- representing Premier and on behalf of the GPOs -- talk a little bit about just very briefly the GPO process, make sure the Court understands how a GPO works, and then get into the conspiracy claims. I do also have a handout, which I -- could I approach the Court?

THE COURT: Yep. You can pass that up. Did you have one to put up on the screen?

MR. DEE: I don't.

THE COURT: Okay.

If you would hand that to my law clerk too.

MR. DEE: The slide deck has a couple of slides relating to market power and foreclosure. I don't intend to go through those unless the Court has any questions.

First, in terms of the background of the GPOs -- and this is on Slide 2 -- so group purchasing organizations, they're a membership organization. Their members are health care providers and they -- what the GPOs do is pool membership purchasing power of their health care providers to get better prices and services from vendors like Becton on behalf of their health care provider members. They get better prices and they lower administrative expenses than those individual health care

providers could get on their own.

GPOs do not manufacture the relevant products in this case. They do not purchase or sell the relevant products in this case. And the GPO agreements are voluntary. The amended complaint makes clear that there are purchases that occur outside of these agreements between GPOs and vendors.

So in terms of the standing argument that Mr. Atkins presented, that standing argument applies with even more force to the GPOs than it does to BD because like BD the GPOs do not sell directly to anyone, any of the defendants. And unlike BD, GPOs don't even sell indirectly to anyone. They don't sell the relevant products to anyone. So, again, the standing applies to them with even more force.

Now, the only way that the plaintiffs can include the GPOs as defendants in this case is to allege a conspiracy, and they acknowledge that their claims rise and fall with respect to the GPOs and the distributors based on the conspiracy claims.

So turning to Page 3 in their complaint, they allege a single conspiracy. In their briefing, they elaborate more on what that conspiracy is and they describe it as a "hub-and-spoke conspiracy." And a couple points about that. First of all, it's not enough just to allege a conspiracy. You must have a link between the members of that conspiracy. And with respect to the conspiracy that the plaintiffs have alleged

as "hub-and-spoke conspiracy," there has to be horizontal links between the competitors in this conspiracy.

So in other words, there has to be a horizontal link between the GPOs Premier and Vizient for them to be included in the conspiracy, and separately there has to be a link between the distributors, a horizontal link, in order to make that conspiracy work.

In this case, the "hub-and-spoke conspiracy" doesn't work with the GPOs. There is no allegation of any connection between Vizient and Premier, no express agreement, certainly, that's acknowledged. And they're only -- what they've acknowledged are only separate agreements between BD and Vizient and BD and Premier.

Twombly is clear, though, that parallel agreements -- that's all we have here -- parallel agreements between the GPOs and a common vendor do not -- are not sufficient to present horizontal conspiracies. And there's other cases we've cited in our briefs that stand for that same proposition. Payment of money is not sufficient, in and of itself, to present a horizontal agreement or any conspiracy.

And what essentially plaintiffs' allegations of this "hub-and-spoke conspiracy" amount to, because they lack the horizontal link, is a rimless wheel. And courts have addressed -- and here, I'm turning to Page 4. The courts have addressed the viability of rimless wheel "hub-and-spoke

conspiracies" as a single conspiracy.

And, again, they require a rim. It doesn't work without a rim. That was the holding of the Fourth Circuit in *Dickson v. Microsoft*, that a wheel without a rim is not a single conspiracy. And there are other cases we have cited, including in the Seventh Circuit, that stand for that very same proposition.

And just as in *Dickson*, no allegation exists in the complaint that Vizient and Premier agreed to participate in a single conspiracy. All they allege, that it is plausible that Premier and Vizient knew about each other's agreements because they both had similar agreements with Becton, Dickinson.

But, again, this is where the case law comes in and says that's not enough. *Twombly*, you could have parallel agreements with identical terms. That does not establish a conspiracy. You must have more to show that it's plausible. And the plaintiffs say, Okay, that's fine. We've had a bunch of cases that support our position. But those cases don't say anything different than *Twombly*, and they're distinguishable from our cases. And this is Page 5.

In fact, looking at those cases, the key cases -- *Toys"R"Us*, *United States v. Masonite*, *Interstate Circuit v. United States* -- those actually support our position because none of the factors that existed in that case exist here. For example, in *Toys"R"Us*, a Seventh Circuit case, the facts were

that Toys"R"Us acted as a ringmaster of a manufacturer group boycott of wholesale clubs.

And this boycott of these manufacturers was an abrupt change, departure for these toy manufacturers. And it was clear, the facts showed, that the manufacturers would only agree to the boycott -- even though they were independent and separate agreements, they would only enter into those agreements with Toys"R"Us if Toys"R"Us assured them that their competitors -- quote, competitors were doing the same thing.

It is a far cry from what we have here. There is no allegation that Vizient and Premier agreed to do anything or knew about each other's contracts or conducted in any way, in any kind of -- as the court said conduct that could be inferred as a meeting of the minds on anything related to the claims in this case.

THE COURT: But what do you say to his argument that you just have to look at the inflated prices and that the GPOs come into this with all this power, and yet we end up with a situation where the health care provider is paying whatever he said --

MR. DEE: 37 percent.

THE COURT: -- 37 percent higher than the market price.

MR. DEE: That -- all he is -- all he is talking about there are nothing that really engages both Vizient and Premier.

There is nothing there that suggests that Vizient and Premier agreed. Those are just the -- there are agreements they have with Becton, Dickinson. There's no suggestion of any collusion or any discussions or any meeting of the minds or anything. The fact that there are higher prices is just a product of the agreements they have with BD. It doesn't mean anything between Vizient and Premier. There has to be more than just higher prices, or there has to be more than a payment, or more than parallel agreements. Those aren't sufficient under the case law we cited in our briefs.

THE COURT: Okay. Go ahead.

MR. DEE: And *United States v. Masonite*, again, where each competitor in that conspiracy, in that case, knew that Masonite proposed to make substantially identical agreements with the others. They knew that. They knew that with each agency agreement they are sent copies of those agreements. When those agreements were modified, each of the competitors received copies of those modified agreements, and they only became effective when each party had signed identical agreements. That's the kind of activity where there is express knowledge of what the others are doing. Maybe you negotiate your agreement differently, but if you have express knowledge of what the others are doing and you -- and in concert agree to the same terms, then that's what's the distinction between our case and *Masonite*.

There is no allegation that would suggest any kind of concerted action between the GPOs. And the *Interstate Circuit* case from 1939 has the same -- essentially, the same types of agreements. Each distributor, in that case, was advised that the others were asked to participate. Each knew that cooperation was essential to successful operation of the plan. So, again, the plan itself was assented to by each of the distributors in that case.

No allegation of BD as a ringmaster here. No allegation that there is mutual assent between Vizient and Premier.

So with that, I'm going to turn it over to the distributors to talk about the allegations against them.

THE COURT: Okay, great. Thank you.

And you are Mr. Fenske?

MR. FENSKE: I am, your Honor.

THE COURT: Okay.

MR. FENSKE: Good morning.

THE COURT: Good morning.

MR. FENSKE: I have not prepared slides, but I do have just copies of the complaint with a few of the key pages and I --

THE COURT: I have the complaint here, so if you want to just refer to the paragraph.

MR. FENSKE: Understood. We'll do.

Your Honor, for the reasons Mr. Atkins explained, the distributors are only in this case for one reason. And that's to contrive an end run around the standing issues that have plagued similar cases in the past. And contrived plaintiffs' claim is, as the complaint makes clear.

The plaintiffs' own allegations plead them out of court. And I'll start your Honor with Paragraph 4, which describes the nature of the alleged conspiracy here.

And it straddles the two pages that Paragraph 4 straddles.

And the conspiracy is this. Becton has unlawfully conspired with GPOs and distributors to force health care providers into long-term exclusionary contracts that restrain trade and inflate the prices of certain Becton products to above competitive levels. So the conspiracy is to force health care providers into long-term contracts containing the exclusionary terms that the plaintiffs are challenging. But the complaint makes clear that the setting of the exclusionary terms begins and ends before any distributor enters the picture.

If you look at Paragraph 42, your Honor -- and some are paragraphs that Mr. Atkins also pointed out, so I'll try to be brief. But Paragraph 42 reads [as read]: As an initial matter, Becton and the GPOs, Vizient and Premier, typically enter into net dealer contracts. These contracts control the

pricing and other terms under which health care providers, which are members of the GPOs, buy Becton products. There's no allegation that the distributors have any role in that.

The next key paragraph, your Honor, is Paragraph 44. And in Paragraph 44, what the complaint alleges is that once a health care provider decides to purchase Becton products pursuant to the terms of a net dealer contract negotiated by its GPO. So the provider makes an affirmative decision to purchase through its GPO. As Mr. Dee mentioned, they have other options. It selects a distributor. The provider picks a distributor, such as Cardinal, Owens & Minor, McKesson, or Henry Schein to deliver Becton's products.

Later in that paragraph [as read]: The distributors and health care providers enter into a related exclusionary contract called a distributor agreement. Distributor agreements typically require that the distributors enforce the requirement that health care providers buy a certain volume of Becton products or else pay the penalty pricing set forth in the net dealer contract.

So what we have here, your Honor, are two paragraphs that demonstrate that the distributors have nothing to do with the exclusionary terms that the plaintiffs are challenging. And your Honor asked Mr. Dee a question about the higher price allegations in the complaint. Again, these paragraphs make clear. As Mr. Dee mentioned, the higher prices don't suffice

to state a conspiracy as to anyone, but particularly as to the distributors, the complaint makes clear that we have nothing to do with those prices.

Now, the -- in their briefing, the plaintiffs and Mr. Molo alluded to this, the "cats paw" argument, the idea that we're somehow enforcing the conspiracy. But as the paragraphs that I just read to your Honor make clear, again, it's the plaintiffs' choice to select the distributor. It's the plaintiffs' choice to purchase through its GPO, and those -- and the plaintiffs -- those contracts, the contracts between Becton and the GPO are the ones that are supposedly anticompetitive.

Mr. Atkins discussed the *Glynn-Brunswick* case quite a bit, and so I'm not going to discuss that in any detail, your Honor, other than to simply point out that it supports our argument that the plaintiffs here have not plausibly alleged a conspiracy because there the Court rejected any notion that there was a conspiracy based on these same contracts between the distributors and the GPOs.

And on Page 1375 of that opinion, the Court noted that plaintiffs do not allege that BD and the distributor negotiate at any time; rather, they assert that the two enter into a dealer notification agreement defining their relationship pursuant to the terms of the net dealer contract, incorporating the pricing, rebate bundling, penalty, and sole source

provisions therein. Just as here, the plaintiffs' complaint demonstrates and expressly acknowledges that the contracts linking defendant, the distributor, and the provider are essentially negotiated between defendant and the GPO, not the distributor.

The plaintiffs point to two other things that they claim show we joined a conspiracy; that we have supposedly agreed to market Becton as a preferred brand, and that Becton has agreed to pay higher sales commissions to distributor sales personnel. If you look at Footnote 9 of the *Glynn-Brunswick* decision, your Honor, the Court there rejected the argument that the same types of agreements and incentives show a conspiracy. And they don't because as we described in our reply brief, those sorts of incentives are routinely held to be procompetitive and not anticompetitive. And they have nothing to do with the conspiracy alleged in Paragraph 4 of the complaint.

Paragraph 4 says the agreement is to force exclusionary terms into the contracts that the GPOs and Becton negotiate. None of these incentives have anything to do with that.

And because Mr. Dee discussed the hub-spoke, horizontal conspiracy issue, your Honor, I won't argue that any further other than simply to note that it applies fully to the distributors. And because the plaintiffs have not alleged any

agreement among the distributors, they have not alleged a viable conspiracy as a matter of law.

Thank you, your Honor.

THE COURT: All right. Thank you.

All right, Mr. Molo, briefly --

Oh, I'm sorry. Mr. Ellis, you may respond briefly to those arguments.

MR. ELLIS: Okay. Good morning, your Honor.

THE COURT: Good morning.

MR. ELLIS: I'm Justin Ellis for the plaintiffs.

I'd like to make three brief points that I think will lay out the context here for why most, if not all of the distributors, the GPOs, and, in fact, Becton's arguments about conspiracy are wholly besides the point.

The first one is simply the same point that Mr. Molo had already laid out in the slide about the *American Tobacco* case, which is that the form of the conspiracy simply does not matter. As long as there is some concerted action, some meeting of the minds, that is sufficient to show a conspiracy, contract or combination restraint of trade in violation of the Section 1 of the Sherman Act.

The second point: Whether there are one or many conspiracies, whether those conspiracies are vertical or horizontal, that is a jury question. That is laid out in the cases that we have cited in Page 4 of our opposition, the GPOs

brief. And it shows that we are not required to prove it at this stage. We are merely to show, as the Supreme Court has said, enough evidence that tends to exclude the possibility that the various actors in this conspiracy were merely acting independently. And as I'll explain in just a minute, we have done more than enough to plausibly so allege.

Finally, the third and important point here is that the defendants are not entitled to recharacterize our allegations of our conspiracy. We have the allegations in the complaint. We are entitled to stick by them. Those are the ones that will stand or fall on this motion to dismiss.

So with that in mind, we should turn to the question of the rim, whether this is a rimless wheel conspiracy that we have alleged here, or is that a hub-and-spoke? And, again, that does not matter. But it is more than enough to show that we have a rim at this stage in the form of a knowing agreement to a broader scheme that was made by each of the individual defendants. Each of the distributors and each of the GPOs have at least plausibly been shown to be aware that there is a broader screen being orchestrated by Becton and that knowing of that scheme, they have joined it.

And the question is, then, what does a rim mean? They're trying to suggest that a rim requires an explicit agreement between, say, Vizient and Premiere or, say, between each of the distributors. And this is why the metaphor that

Mr. Molo was using about drug conspiracy cases is so important. Because if you had a defendant come in here who was indicted for selling crack on the streets of East St. Louis, it would be no defense for him to say that he could not be part of a conspiracy with another street dealer because the two of them had not gotten together and shook hands on how to sell their crack. Rather, it would be enough to say that the street dealer joined in a scheme with his wholesaler or with his enforcer or with his dirty cop, knowing that there was something broader afoot. And that's what we have here.

And this is, in particular, why the *Orlando* case that we've cited in our opposition to the distributors' brief -- and just for your reference, it's at 819 F.3d 1016. It shows that a rim means a lot less than what the distributors and the GPOs would have you believe.

In that case, again, that was a scheme by several defendants to go around the country visiting various businesses and trying to extort money from them. There is one defendant McManus, McManus said that he had only gone on one trip, and therefore he couldn't be part of a broader scheme. He said that he was merely part of a rimless wheel because he didn't, you know, agree with the other conspirators to extort all these other businesses to whom he had not visited.

The Seventh Circuit rejected that argument. They said that there was a rim because there was a knowing agreement to a

common scheme. McManus had in his trip overlapping participants, overlapping methods, and an overlapping purpose. And because he had those overlapping features, that was enough to apply a rim.

So, too, here. Here, we have each of the distributors are dealing with the same GPOs, and they're dealing with Becton. The GPOs, likewise, are dealing with the same distributors and with Becton. There are overlapping participants. There are overlapping methods. These contracts that are restraining trade happen ever so conveniently to be the same and to have the same methods that restrain trade by imposing exclusive dealing terms on the plaintiffs.

And, indeed, the distributors are also taking the same schemes outside of the contract to also further Becton's restraint of trade. They are also each agreeing to say allow Becton to pay their distributors' employees bonuses, which in a way allows Becton to monitor the distributors' compliance with the conspiracy by giving them direct access to their employees. And they're both all -- in fact, they're all helping Becton by also emphasizing Becton in their advertising to the exclusion of other competitors.

And because of these overlapping practices, you can plausibly allege -- we have plausibly alleged that these various participants are all aware of the broader scheme that is being orchestrated by Becton. And, again, that's all we

need to allege. The defendants, in essence, are asking, as Mr. Molo pointed out, for us to prove our claims like we would to a jury.

But *Twombly* is clear. What we need at this stage is merely to raise a reasonable expectation that discovery will undercover evidence of an illegal agreement. And that is what we think we can do in discovery. And that's also what ties this case to the three Supreme Court and Seventh Circuit cases we cited in the our case about the need or lack of a need for an explicit agreement between the spokes: *Interstate Circuit*, *Masonite*, and *Toys"R"Us*. None of those cases involved an explicit agreement between the various spokes, and yet the Supreme Court and the Seventh Circuit still held that a single Section 1 conspiracy was alleged.

Now, the distributors had just made an argument that you need -- I'm sorry -- the GPOs had just made an argument that in each of those cases you would need an explicit or at least tacit understanding between the defendants; that, for instance, in *Interstate Circuit*, each of the various participants in the scheme were copied on it, and so they would know that the others were involved. Or, say, in *Masonite*, that -- I'm sorry -- in *Toys"R"Us*, that each of the various manufacturers had at least an expectation that the other manufacturers would be in on the scheme.

But that's what discovery is going to undercover.

Here, we have enough facts that show that they are acting contrary to their normal economic motives and in suspicious ways that would suggest that they are, in fact, acting in concert.

And so we can show from the distributors and the GPOs' action what those concerted actions are, in particular, for the distributors. As Mr. Molo said, they're the enforcers. They are the "cat's paws." And they have both the motive to act on in a concerted faction, and they, in fact, act on that motive. So their motive is, of course, that they receive payments based on volume. The more money that goes towards Becton products under these conclusive dealing contracts, the more money that the distributors stand to make. And they act on that motive by taking actions that are otherwise hard to explain.

In particular, as we allege in Paragraph 46 of the amended complaint, the distributors are making cash payments to the GPOs based on volume. And they agree to do that in their contracts with Becton, the dealer notification agreements. And it's very hard to find an innocent explanation as to why they would do that. Why are the distributors paying off a GPO that has nothing to do with them? Likewise, why are the distributors allowing Becton direct access to their employees, other than to allow the Becton to credibly monitor the distributors' compliance with the illegal scheme?

Likewise, for the GPOs, they also have the motive to

enter into a concerted action, and they act on that motive. The GPOs are, in fact, being paid off by the counter-party on the other side of the table. The GPOs are meant to represent our clients, the health care providers, honestly and to get the best possible deal they can by negotiating those prices down.

But the facts show that they don't, and this is a nationwide problem. As we cited a study from the GAO, on Page 6 of our statement of facts, GAOs and GPOs, in fact, tend to have higher prices than what you can get on the retail market, which is very suspicious. Because the whole point of a GPO, after all, is to aggregate large numbers of providers that they can hopefully use that purchasing power to bid down prices, and instead the prices are going up. And that's just what's happening here. The GPOs are supposed to be negotiating lower prices for Becton, for Becton's products, for their consumers. Instead, they're getting prices that are 11 to 36 percent higher than what they could get on the open market.

And the GPOs, again, have full motive because if the GPOs were not part of a conspiracy, they would compete against each other. They would have to negotiate more aggressively with Becton, and they would have to bid down prices. But that, in turn, would lower the amount of money that GPOs get, because, again, the payments that the GPOs are getting from Becton are volume-based. And so if the GPOs drive down the prices, they're, in fact, going to get less money.

To the contrary, they act in a way that's going to help Becton and help themselves. They are going to act in a way that's going to raise prices and thus allow them to get more money in terms of the administrative fees.

And even then, the distributors are paying off the GPOs to further align the GPOs' incentives. The distributors make payments that give the GPOs the incentive to actually distribute -- set prices that are in Becton's favor and the conspiracy's favor rather than in the favor of their clients.

COURT REPORTER: Mr. Ellis, may I have just one moment?

MR. ELLIS: Oh, of course.

COURT REPORTER: Thank you, sir.

MR. ELLIS: Sure.

Now, the defendants had made a lot of *Dickson* case, the case out of the Fourth Circuit, which did purport to require an explicit agreement between the defendants. But *Dickson* is directly contrary not only to the Seventh Circuit's ruling in *Toys"R"Us*, but also to the Supreme Court's rulings in *Interstate* and *Masonite* circuit *[sic]*. And, in fact, all you have to do is look at the dissent in *Dickson* to see how that case had gone wrong. That dissent, Judge Gregory on the Fourth Circuit had explicitly said, under *Interstate* and *Masonite* circuit, is very clear that an explicit agreement is not required. All you have to have is some tacit understanding

that they have joined a broader scheme.

And that, in turn, is the same answer to the question your Honor had raised about the meeting of the minds. This is not as the GPOs and the distributors have suggested in their briefs and here today that they have to have an evil intent or that they have to specifically intend to help Becton raise prices or maintain a monopoly. That's not the case, because as you see, for instance, in the *United States v. United States Gypsum* case that we cited our briefs, you can show a Section 1 conspiracy either -- either -- by proof of an anticompetitive intent or an anticompetitive effect.

Now, we believe that discovery will show anticompetitive intent because of the motives we have laid out here for them to raise prices and benefit themselves. But by itself the anticompetitive effect, the higher prices that they have to pay, that our clients have to pay, is by itself a violation of Section 1. And so the meeting of the minds is not, again, some sort of evil intent. And it is certainly not the specific intent to help Becton maintain a monopoly that was required in the Section 2 case in *Brunswick*. Rather, they have to agree to the terms that they agreed to, and they have to know what they're getting into; and that, what we allege, is the case.

And so, again, I just close and say all we need to show is a reasonable expectation that discovery will uncover

evidence of our illegal scheme, and we believe we have more than plausibly done that.

Thank you.

MR. MOLO: One minute.

THE COURT: All right. Thank you.

MR. ELLIS: Oh, sure.

Sure. There's one final point I think I'd like to make, actually. And if I could use the ELMO for a second, please.

THE COURT: Mmm hmm.

MR. ELLIS: And this is the chart that Mr. Atkins made quite a bit of to suggest that some wall of authority had somehow foreclosed our ability to rely on the conspiracy exception. But the crucial point is, all but one of these cases did not involve allegations of conspiracy. All these cases -- *Lakeland*, *Hypodermic Products*, *Warren General*, *St. Francis*, *Delaware Valley* -- none of those involved any allegations of conspiracy.

And, in fact, as we lay out in our opposition to Becton, Dickinson's motion to dismiss, many of those cases are not even the same type of exclusive dealing claim we have here. They are tying cases, they're Section 2 cases, they are things that are fully afield. And *Brunswick* did involve arguments in the briefing as far as a conspiracy allegation.

But the point remains that the complaint in *Brunswick*

did not allege the same detailed allegations of conspiracy that we allege here.

And, in particular, while the allegations about the scheme are the same as in *Brunswick*, because, of course, *Brunswick* -- Becton's practices are the same as they were two years ago in the *Brunswick* case, the allegations about the conspiracy are very different.

And so the *Brunswick* complaint did not involve allegations of the cash payments from -- that are going between the different parties. It didn't involve the commissions that were being made by Becton to the distributors, and it did not involve the advertising allegations.

And so, once again here, this is not so much wall of authority. This is merely saying that in other cases where plaintiffs did not allege the conspiracy doctrine, there was no standing. Here, we have plausibly alleged a conspiracy; therefore, we have standing.

THE COURT: Okay. Do you think that if I applied the conspiracy exception here, would that be expanding that exception beyond where it has been before now?

MR. ELLIS: No. I do not believe so. You would not -- you would not be expanding it any further than what the Seventh Circuit has already done in *Paper Systems*, in *Brand Name*, and in *Fontana*. And it's important there to show that in *Fontana*, in particular, that case is covering the same ground

that you would be covering here because *Fontana*, like this case, involved types of anticompetitive conduct other than vertical price-fixing.

Mr. Atkins pointed out that there was some allegations of resale price maintenance, but as he cannot deny, there were also allegations of other conduct, such as territory allocation and other anticompetitive schemes. And if he were right, that price-fixing is the only way that you can avoid an overcharge or enjoy a passed on overcharge, then *Fontana* would have had to dismiss those defendants for lack of standing because they would be seeking damages that were based on market allocation and other schemes not involving price-fixing, but it did not.

And the reason why, as *Paper Systems* explains, is joint and several liability. We are not seeking a passed on overcharge because we can go after any defendant for the entire output of the conspiracy. That's what joint and several liability means. And so we don't ever have to apportion some overcharge, say, between the distributor that sells to us and Becton. There's no way in which, say, the distributor absorbs some part of the overcharge and then passes on some to us. Rather, we can go after every defendant for every bit of the damages. And because of that, there is no overcharge, there is no *Illinois Brick* problem, and this falls squarely within the conspiracy doctrine, as laid out in *Paper Systems* and *Fontana*.

THE COURT: Okay. So would those be -- I was going to

go ask you, what's your best case for applying the exception to this case?

MR. ELLIS: Yes, *Paper Systems* and *Fontana*.

THE COURT: Would you say *Paper Systems* and *Fontana*?

MR. MOLO: *Paper Systems* and *Fontana*, yes.

THE COURT: Okay. All right. Thank you.

Very briefly, if you want to make a point.

MR. DEE: Sure.

Your Honor, I just want to say that -- a couple of things. But, first of all, they're the ones who have to -- who decide on what the conspiracy that they -- that they're alleging. They can't just throw up a bunch of stuff at you and say you decide what kind of conspiracy its alleged. They have said in their papers that they are claiming, they are alleging a "hub-and-spoke conspiracy." And you can not have a "hub-and-spoke conspiracy" unless you have the horizontal connections between the two GPOs and the -- between them and between the distributors.

Absent horizontal allegations that would tend to support an agreement between those two, a meeting of the minds of those two, on the GPOs and of the distributors, you don't have a "hub-and-spoke conspiracy."

And all they're relying on are basically the commercial agreements that the GPOs have with BD and which the distributors have with BD. That's not enough.

Their argument that distributors and GPOs knew that something was afoot, what was that? What is it that they're claiming was afoot? Is it that BD's contracts have allegedly higher prices?

Having higher prices is not illegal. Selling products to customers who want them is not illegal. Everything that was just described is consistent with independent, rational economic behavior. GPOs earn fees. That's how they make money. Distributors make more money selling BD's products. There's nothing wrong with that from an antitrust perspective. *Twombly* requires allegations showing that the conduct cannot be explained absent a conspiracy, and that's what's lacking here.

THE COURT: Well, I noted -- I mean, throughout the briefing, all these terms are thrown out of "vertical conspiracy," "hub-and-spoke," "horizontal," but I think -- and I'll go back and read it again carefully. The amended complaint talks about a vertical conspiracy, regardless of whatever else is argued. And so, you know, following through with that, what the plaintiffs are saying is, We don't know what will ultimately be proven, but there's enough here to get past Rule 12. What do you say to that?

MR. DEE: Well, I'd say that initially we thought they were alleging a vertical conspiracy as well until we got their briefing, and their briefing described the conspiracy as a "hub-and-spoke conspiracy." And they have to do that, for they

know they have a problem -- and I'll -- for example, with the GPOs, they know that you can't -- if you have a vertical conspiracy without any horizontal connection between the two GPOs, you can't aggregate their market share. They make a big deal about this 75 percent combined market share. They can only make use of that combined market share if they have a horizontal conspiracy between the two GPOs. And they admit, you know, they have a problem because if they are -- for example, with Premier, there's only a 25 percent market share, even under their sort of twisted analysis of market share, their proxy of what is market share. And that, under Seventh Circuit law, is not sufficient. They can't state a claim for a vertical conspiracy with respect to the GPOs if they don't have a "hub-and-spoke." We pointed that out in our briefing, and that's why they came back with, No, it is a "hub-and-spoke," it is a "hub-and-spoke." It is not a vertical.

So they're saying it is a single conspiracy, and you can't have -- in this context, you can't have a single conspiracy without it being "hub-and-spoke." I mean, GPOs are not in the chain of distribution. They're outside of that. They just negotiate the price. It's a separate, sort of, part of the whole transaction.

And so you can't have a single vertical conspiracy under these -- with these parties, you have to have a "hub-and-spoke." And they can't plead it because they can't

show those facts that are outside the contracts that would suggest that -- outside the contracts with BD that would suggest that there's any kind of tacit agreement or mutual assent between the GPOs, the two GPOs, or between each of the distributors.

THE COURT: Okay.

MR. ATKINS: Your Honor, can I have 30 seconds to respond to the standing question?

THE COURT: You may.

MR. ATKINS: Thank you, your Honor.

With respect to these cases, every one of them besides *Brunswick* involved a Section 1 conspiracy or contract in restraint of trade. You just have to look at the cases, every one of them. Okay?

THE COURT: Okay.

MR. ATKINS: No. 2, the critical thing is the conduct is led -- the conduct alleged in *Brunswick*, as it was here, is not unilateral behavior by BD but conduct involving the same contracts -- sole source contracts, bundling contracts, et cetera, et cetera. I read those to you. So it is the same conduct. Obviously, instead of bringing a monopolization claim, now they say it is a Section 1 claim, but it is the same alleged anticompetitive conduct.

Secondly, the argument that there were -- there are different allegations here about the benefits provided to the

distributors that was not alleged in *Brunswick*, not true. If you look at Judge Wood's decision, in Footnote 9 she addresses this very issue head-on, and she says she rejects the argument that there is the kind of conspiracy alleged to take us outside of *Illinois Brick*. That's what she was addressing, the standing question. And she says the same can be said of the other purported benefits cited by plaintiffs, financial incentives paid to the distributor, markups on products other than syringes, and compensation -- referring to compensation to distributors -- for promoting defendants' products.

So the exact same argument was made about the distributors having additional benefits to supposedly participate in some kind of conspiracy. It's in Paragraph 86 of the *Brunswick* complaint. Same allegation, same argument, it should be rejected for the same reasons.

And to just finish on the point I've made several times about the kind of conspiracy required to get out from under *Illinois Brick*, I will fulfill my promise and leave you with copies of Areeda.

Thank you, your Honor.

THE COURT: Okay. Mr. Fenske, you get the last word briefly.

MR. FENSKE: Happy to, your Honor, and I will be very brief.

Your Honor, in Mr. Ellis' presentation, I didn't hear

any argument as to how it makes sense that the distributors entered into a conspiracy to force exclusionary terms into contracts with providers that are set and negotiated before the distributors ever enter the picture.

Mr. Ellis relies upon sort of, I think, two things primarily to try to argue that the distributors joined the conspiracy.

The first is, again, that our contracts with Becton are supposedly similar. And I just point your Honor to the case that we cite on Page 4 of our reply briefs, the *United States v. CIBA* case. It reads [as read]: Even when one company has put together a series of similar agreements with other companies in the course of marketing its product, this similar conduct on the part of those other companies is not necessarily equivalent to an illegal combination or conspiracy. Some evidence, in addition to that fact, that the companies acted in a similar manner is ordinarily required to establish an existence of a combination or conspiracy.

And that's just applying the rule that the Supreme Court then applied in *Twombly*, that parallel conduct does not bespeak unlawful agreement.

Now, Mr. Ellis talked about the distributors supposed motive to join the conspiracy. And he asked, well, why are the distributors making cash payments to the GPOs? Well, the reason is all the distributors do is say, We will abide by

whatever terms Becton and the GPOs negotiate, whatever they are. And the Becton and GPO contracts require these payments. The complaint in Paragraph 44 expressly alleges that those payments are made when the GPOs hit the volume targets in the Becton-GPO agreements.

And Mr. Ellis also asked why the distributors' sales personnel would accept higher commissions for selling Becton products. In the very footnote that Mr. Atkins just mentioned, the *Glynn-Brunswick* court made clear that those sort of common incentive provisions do not show an unlawful conspiracy.

And I'll close, your Honor, with a response to Mr. Ellis on the supposed need for more discovery. The Supreme Court has made clear in antitrust cases that courts, when they're considering 12(b)(6) motions, need to be mindful of that kind of request. The Supreme Court, in *Twombly*, quoting the Seventh Circuit's *Car Carriers* decision said as follows [as read]: The cost of modern federal antitrust litigation and the increasing case load of the federal courts counsel again sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.

That principle applies equally here. Thank you, your Honor.

THE COURT: All right. Thank you.

Thank you, everyone. This was very helpful. I

appreciate the arguments. I am going to go back and take a look at all the cases and read the complaint carefully, and I'll get you an order as soon as I can. The motions are under advisement. Thank you.

-oOo-

REPORTER'S CERTIFICATE

I, Molly N. Clayton, RPR, FCRR, Official Court Reporter for the U.S. District Court, Southern District of Illinois, do hereby certify that I reported with mechanical stenography the proceedings contained in pages 1 - 83; and that the same is a full, true, correct and complete transcript from the record of proceedings in the above-entitled matter.

DATED this 8th day of November, 2018.

s/Molly Clayton, RPR, FCRR